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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER MOSS,

Defendant and Appellant.

A146665

(Alameda County  
Super. Ct. No. 174516)

This is an appeal from judgment after a jury convicted defendant Christopher Moss of numerous crimes, including robbery, residential burglary, kidnapping to commit rape or robbery, sexual battery and possession of a firearm by a felon. According to defendant, the trial court committed reversible error by: (1) denying his motion for a pretrial lineup; (2) giving an instruction to the jury on consideration of his other sexual offenses that lessened the prosecution's burden of proof; and (3) committing cumulative errors to his prejudice. Defendant also contends, and the People concede, he was erroneously convicted on two counts of possession of a firearm by a felon instead of one count.

In supplemental briefing, defendant raises two additional arguments. First, he contends that, in light of recent amendments to Penal Code sections 12022.5, subdivision (c) and 12022.53, subdivision (h), his case must be remanded to allow the trial court to exercise its new discretion to consider whether to strike or dismiss the multiple firearm enhancements imposed below. Second, he contends that other recent changes in California law, including amendment of Penal Code section 3051, require

remand of his case to permit him to make an adequate record of any and all youth-related factors in anticipation of his eventual youth offender parole hearing, given that he was just 20 years old when committing these crimes. The People do not oppose these supplemental requests.

For reasons set forth below, we reverse the judgment and remand this matter to the trial court to: (1) amend the abstract of judgment to strike defendant's conviction on one of the two counts of being a felon in possession of a firearm; (2) exercise its discretion in the first instance to decide whether to strike or dismiss defendant's multiple sentencing enhancements; and (3) hold a hearing so that defendant can make an adequate record of any and all youth-related factors in anticipation of his eventual youth offender parole hearing. In all other regards, we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On March 3, 2015, an amended information was filed charging defendant with 12 felony counts: kidnapping Claire Doe (Claire) to commit rape or robbery (Pen. Code, § 209, subd. (b)(1)) (count 1);<sup>1</sup> first degree residential burglary of Claire's residence with another person present (§§ 459, 667.5, subd. (c)(21)) (count 2); sexual battery by restraint of Claire (§ 243.4, subd. (a)) (count 3); second degree robbery of Alejandro N. (Alejandro) with personal use of a firearm (§§ 211, 12022.5, subd. (a), 12022.53, subds. (b), (g)) (count 4); attempted second degree robbery of Violeta S. (Violeta) with personal use of a firearm (§§ 211, 12022.5, subd. (a), 12022.53, subds. (b), (g)) (count 5); possession of a firearm by a felon on or about September 2, 2013 (§ 29800, subd. (a)(1)) (count 6); second degree robbery of Susan Doe (Susan) with personal use of a firearm (§§ 211, 12022.5, subd. (a), 12022.53, subds. (b), (g)) (count 7); second degree robbery of Jane Doe (Jane) with personal use of a firearm (§§ 211, 12022.5, subd. (a), 12022.53, subds. (b), (g)) (count 8); attempted first degree residential burglary of Jane's residence with personal use of a firearm (§§ 459, 12022.5, subd. (a), 1203.06, subd. (a)(1)) (count 9); sexual battery by

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<sup>1</sup> Unless otherwise stated, all statutory citations herein are to the Penal Code.

restraint of Susan with personal use of a firearm (§§ 243.4, subd. (a), 12022.5, subd. (a)) (count 10); sexual battery by restraint of Jane with personal use of a firearm (§§ 243.4, subd. (a), 12022.5, subd. (a)) (count 11); and possession of a firearm by a felon on or about August 31, 2013 (§ 29800, subd. (a)(1)) (count 12). A jury trial revealed the following facts.

**I. The Prosecution's Case.**

**A. The August 31, 2013 Incident: Jane and Susan.**

Jane and Susan were spending time at Jane's townhouse. At about 10:30 p.m., they left Jane's townhouse to walk with her dog to a nearby corner store to buy snacks. At the store, Jane noticed an African-American man wearing a royal blue jacket and dark jeans having an altercation with the cashier over a bag of chips. This man, later identified as defendant, was with another African-American male, shorter and wearing a cream-colored jacket.

Jane and Susan purchased their items and were walking back to Jane's townhouse when Jane noticed they were being followed and heard male voices calling them derogatory names. The young women kept walking, eventually reaching Jane's gated townhouse complex. As Jane unlocked the front gate to the complex, the two men she had noticed at the store forced their way inside.

The men pointed guns at Jane and Susan and demanded that they hand over their valuables, threatening to shoot Jane in the leg. Susan complied, handing over her store purchases, jewelry, and cell phone, after which defendant placed his hands inside her shirt and fondled her breasts. Defendant then placed his hands down her pants, touching her buttocks and telling her she had a "fat ass."

Jane, in turn, told defendant she had no property. Defendant reached in her pocket and took her change. He also took Jane's keys and dog leash. At this point, defendant placed his hands inside her shirt and bra and fondled her breasts. Afterward, he demanded that Jane take him inside her townhouse. Jane refused, telling him she was an immigrant and had nothing of value inside. Defendant accused Jane of lying and warned

that if he found any laptops or other valuables, he would kill Jane and Susan, letting them pick who would die first.

The second man told defendant they should just leave, to which defendant responded they would not leave without first getting everything from inside the townhouse and then “finish[ing]” Jane and Susan. Jane, however, continued to refuse to let him inside her townhouse, telling defendant he could shoot her where she was. Jane then walked back toward the front gate, whimpering loudly in hopes of alerting a neighbor. Apparently, a neighbor did hear Jane, because someone made a noise by the window, sounding as if the neighbor was talking to someone. The second man took off, jumping the fence. Defendant tried to follow but could not. He thus pointed his gun and demanded that Jane use her key to unlock the gate so he could leave. She complied. Defendant then instructed both women to lie down on the ground and, when they did, ran off. Shortly thereafter, Jane heard gunshots. Eventually, they got up and called 911.

Police subsequently retrieved video surveillance from the corner store, with which Jane was able to identify defendant.

**B. The September 2, 2013 Incident: Violeta and Alejandro.**

At about 7:00 a.m., Violeta and Alejandro left home and walked toward their car. Violeta noticed a red car double parked in the middle of the road with an African-American man sitting in the driver’s seat. The couple got into their car, chatting as the car warmed up. Suddenly, two men approached, one of which was the man Violeta had seen in the red car. This man, about 5’7” or so, wearing a red sweater, went to her side, while another man, in a blue jacket (later identified as defendant), approached Alejandro’s side. The man opened Violeta’s car door and demanded her money. When Violeta said she had none, the man leaned inside and grabbed Alejandro’s phone and wallet.

Meanwhile, on the other side of the car, defendant lifted his jacket to show Alejandro his gun and demanded that Alejandro hand over all his money or face death. Defendant reached over and yanked Alejandro’s necklace from his neck, took keys from his pocket and punched him in the face. Both men then fled in the red car.

### **C. The September 2, 2013 Incident: Claire.**

The same morning at about 8:45 a.m., Claire left her apartment to take out her garbage, still wearing her pajamas, which consisted of leggings and a t-shirt. When she turned to go back inside, two men approached her, shirtless with bandanas covering the bottom half of their faces. One of the men grabbed Claire and forced her inside her home, while the other man (later identified as defendant) punched her in the head and face.

Claire fought back, managing to get back outside her apartment, but falling on the sidewalk a few feet from her door. The second man punched her head to the sidewalk while defendant dragged her about 10 to 15 feet down the street. Claire yelled for help, kicking her legs and flailing her arms. Both men ripped open her shirt, exposing her bare chest. Both men proceeded to grab and squeeze her breasts multiple times, while Claire continued screaming. The two men ran off.

Two neighbors heard Claire's screams. Y.M., one of her neighbors, ran outside and saw two men running toward a red car with a license plate number beginning with 5YS. Y.M. noticed one of the men had an arm that was noticeably stiff and oddly angled. He was holding something shiny in his hand.

N.V. also ran outside during this incident and saw two men attacking a woman, dragging her down the street and beating her before running to and driving off in a "reddish, purplish" car. The police were called.

Officer Espinoza of the Oakland Police Department later received a radio dispatch reporting a suspect red car with 5YS in the license plate number. Officer Espinoza located this vehicle parked on the 2100 block of Myrtle Street—to wit, a red car with license plate number 5YYS623. After waiting about 10 minutes to see if anyone would approach the car, the officer saw two men get in and begin driving. As Officer Espinoza was about to stop the car, it suddenly made a U-turn and sped away. The officer pursued it and, eventually, heard screeching and the sound of tires popping. As Officer Espinoza came to the car, he saw both doors open and defendant sprinting away from the passenger side, holding his right arm.

Defendant was detained and the red car searched for evidence. Defendant's fingerprints were found on the passenger door, and DNA likely to be his was found inside. Also inside were Alejandro's gold chain and cell phone. Alejandro and Claire subsequently identified defendant as their attacker, and Y.M. and N.V. identified the red car as the one they saw being used by Claire's attackers to escape.

## **II. The Defense Case.**

Dr. Michael Krosin, an orthopedic surgeon, treated defendant in 2010 for a gunshot wound to the elbow. Dr. Krosin performed surgery on defendant, but ultimately, his elbow was left fixed at a 30-degree angle with a very limited range of motion. Defendant could, however, still grip items, close his hand into a fist and swing his arm across his body.

## **III. The Verdict, Sentence & Appeal.**

On June 17, 2015, defendant was found guilty as charged, with all enhancements found true. On October 16, 2015, he was sentenced to an aggregate term of seven years to life, consecutive to 29 years, in state prison. This timely appeal followed.

## **DISCUSSION**

Defendant raises several arguments on appeal. First, defendant contends the trial court prejudicially erred by denying his motion for a pretrial lineup involving one of the victims, Claire. Second, he contends the trial court prejudicially erred when giving the jury a modified version of CALCRIM No. 1191 because, in allowing the jury to consider "propensity evidence" pursuant to Evidence Code section 1108, it lessened the prosecutor's burden of proof with respect to the charged sex offenses. Third, defendant contends "cumulative errors" committed by the trial court rendered his trial fundamentally unfair and require reversal. Fourth, defendant contends, and the People concede, the judgment must be modified to strike one of the two convictions for being a felon in possession of a firearm. Lastly, defendant contends (and the People agree) that, in light of recent statutory amendments, his case must be remanded so that the trial court may exercise its new discretion to decide whether to strike or dismiss his multiple sentencing enhancements and hold a hearing so that he has the opportunity to make an

adequate record of youth-related factors in anticipation of his eventual youth offender parole hearing. Each argument is addressed below.

**I. Denying the Defense Motion for a Pretrial Lineup.**

Prior to trial, defendant moved for a pretrial lineup with respect to Claire on the ground that it was reasonably likely that when she identified him as her attacker at an in-field showup on the day of her attack, she was physically and mentally unwell.<sup>2</sup> In so moving, defendant noted that, while Claire immediately identified him at the showup based upon his height, body type, hair and facial structure, she then became confused after being shown two additional individuals, telling her boyfriend that the police “ ‘might have caught them and I’m having fuckin’ trouble identifying them ‘cause they were wearing bandanas, and it just, like, happened really fast.’ ” He further notes that Claire told police she did not see any tattoos on her attacker, yet he has several tattoos. A pretrial lineup, he argues, would have revealed these and other deficiencies in her identification.

The trial court denied this motion due to “concern[] about the timeliness of this motion,” as well as “all of the other information provided relative to the red car, [and] the initial and earlier actions allegedly of the defendant . . . .” Defendant argues the trial court’s ruling is prejudicial error. The governing law is not in dispute.

“A properly conducted lineup is, among other things, a device by which the People can discover which witnesses are able to identify an accused and thus provide material evidence of guilt. At the same time the lineup may reveal that other witnesses, perhaps some who should be able to identify the real perpetrator of a crime, are unable to identify the particular accused as such criminal. If so, that evidence is equally material and access thereto should not be denied an accused. [¶] Because the People are in a position to compel a lineup and utilize what favorable evidence is derived therefrom, fairness requires that the accused be given a reciprocal right to discover and utilize

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<sup>2</sup> Claire told a police officer at the scene that she had a headache and felt foggy, and was later diagnosed with a concussion.

contrary evidence.” (*Evans v. Superior Court* (1974) 11 Cal.3d 617, 623 (*Evans*).) At the same time, however, a defendant does not have an absolute right to demand a pretrial lineup. Rather, the California Supreme Court has provided the following guidelines for determining whether such lineup should be afforded. “[D]ue process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate. The right to a lineup arises, however, only when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve.” (*Id.* at p. 625.)

“The questions whether eyewitness identification is a material issue and whether fundamental fairness requires a lineup in a particular case are inquiries which necessarily rest for determination within the broad discretion of the magistrate or trial judge.” (*Evans, supra*, 11 Cal.3d at p. 625.) Here, we conclude the trial court acted within the scope of its broad discretion in denying defendant’s motion for a pretrial lineup.

First, given the record in this case, the trial court could have reasonably found no reasonable likelihood of mistaken identification. Claire immediately identified defendant as one of her assailants at the in-field showup on the day in question based on several of his particular traits (including his build, skin tone, and haircut). And, despite exhibiting some confusion when she was subsequently presented with two other individuals, Claire never withdrew her identification of defendant and, in fact, confirmed his identity to a police officer when interviewed the next day.

Further, there was a plethora of other evidence linking defendant to the crimes, including evidence from multiple sources linking defendant to the same red car used in the crime against Claire. Specifically, Alejandro and Violeta identified the red car as the vehicle used by their robbers, and Alejandro identified defendant as one of the robbers. Officer Espinoza testified that, after responding to the report by Claire’s neighbors that her attacker had escaped in a red car with license plate number containing 5YS, he saw defendant enter the passenger side of a red car with license plate number 5YYS623. Officer Espinoza then saw defendant run from this car after its tires became flat. And,

afterward, a police search of this red car revealed property that had been stolen from Alejandro in the separate incident involving Alejandro and Violeta. Given these circumstances, even accepting defendant's argument that Claire expressed some confusion at the showup, there is no reasonable probability of a mistaken identification of defendant by Claire that would have been resolved by the proposed pretrial lineup. (See *People v. Williams* (1997) 16 Cal.4th 153, 236 [no abuse of discretion to deny motion for a lineup where "defense counsel conceded a lineup 'might not accomplish much, your honor,' though he did 'think it would accomplish something' "]; accord, *Evans, supra*, 11 Cal.3d at p. 625.)

In so concluding, we acknowledge the parties' dispute in briefing regarding whether Claire had trouble identifying defendant in court during the preliminary hearing, prompting counsel to request a recess. Regardless of which party is correct on this point, it is undisputed defense counsel had ample opportunity to cross-examine Claire on her identification of defendant and, later, to strongly argue to the jury that her identification was uncertain. Defense counsel also had ample opportunity to cross-examine Claire regarding any confusion or physical ailment she may have had at the in-field showup that could have impaired her judgment when she first identified defendant. The record reflects Claire testified during her cross-examination that she "knew right away when [she] first saw [defendant] that it was him," yet started to question herself when the police brought forward two other suspects because she did not want to wrongfully accuse anyone. Nonetheless, Claire explained, she ultimately knew the other two men were not her attackers because they were "too young" and "looked smaller" than defendant. Claire thus knew she had already "identified the right person." The jury was entitled to accept Claire's testimony.

Also supporting Claire's testimony is the fact that Y.M., the neighbor who ran outside after hearing a woman screaming on the day in question, testified to seeing two men, one of whom had a noticeably stiff and oddly angled arm, running toward a red car, license plate number beginning with 5YS. Corroborating this evidence, the jury then heard testimony from Dr. Krosin, a surgeon who testified that, due to a severe gunshot

wound received in 2010, defendant's elbow was permanently fixed at a 30-degree angle with a very limited range of motion.

Further, and also supporting the trial court's ruling, is the fact that defendant waited a full 10 months after his crime to move for the pretrial lineup. As defendant's own authority makes clear: "The broad discretion vested in a trial judge or magistrate includes the right and responsibility on fairness considerations to deny a motion for a lineup when that motion is not made timely. Such motion should normally be made as soon after arrest or arraignment as practicable. We note that *motions which are not made until shortly before trial should, unless good cause is clearly demonstrated, be denied in most instances by reason of such delay.*" (*Evans, supra*, 11 Cal.3d at p. 626, italics added.) The trial court's decision that defendant's delay weighed against granting his motion was thus reasonable. (*Ibid.*; accord, *People v. Sullivan* (2007) 151 Cal.App.4th 524, 561 ["We are convinced that an additional pretrial lineup would not have yielded any different testimony by the witnesses, or cast doubt upon any of the identifications made by them. Therefore, we find no abuse of discretion in the trial court's denial of defendant's motion for a lineup"].)

Finally, even were we to find error, we would nonetheless conclude any such error was harmless. "[U]nder *Watson*, a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error. ([*People v.*] *Watson* [(1956)] 46 Cal.2d [818,] 836.) Prejudice under *Watson* 'must necessarily be based upon reasonable probabilities rather than upon mere possibilities.' (*Id.* at p. 837.) The dilemma for a defendant in this circumstance is that the trial court erred in denying the *opportunity* for a lineup. The outcome of that lineup is unknown because it was never conducted. '[I]t has long been recognized that "[i]n the case of in-court identifications not preceded by a lineup . . . , the weaknesses, if any, are directly apparent at the trial itself and can be argued to the court and jury . . . ." [Citations.]' [Citation.] This court's decision in *Evans, supra*, 11 Cal.3d 617, 'did not overrule the principle that an identification made in front of the jury carries with it the circumstances under which it

was made, which, in turn, can be argued to and weighed by the jurors.’ [Citation.]” (*People v. Mena* (2012) 54 Cal.4th 146, 162.)

Here, we conclude defendant cannot meet this standard of prejudice. As the California Supreme Court counsels: “There may be some circumstances in which a defendant would be able to establish prejudice. However, many attempts to do so will founder on the shoals of speculation. The mere assertion that the witness might *possibly* have failed to make a positive identification cannot demonstrate prejudice under *Watson*.” (*People v. Mena, supra*, 54 Cal.4th at p. 162.) And, here, defendant insists the witness identifications were “ ‘open to attack,’ ” yet he points to nothing in this particular record demonstrating he would have obtained a more favorable result but for the trial court’s failure to order the lineup. (*Watson, supra*, 46 Cal.2d at p. 836.) In the absence of actual facts, we decline to assume defendant suffered undue harm. Accordingly, the trial court’s ruling stands.

## **II. Instructing the Jury on a Modified Version of CALCRIM No. 1191.**

Defendant also challenges the modified version of CALCRIM No. 1191 given by the trial court to the jury on the ground that it prejudicially lowered the prosecution’s burden to prove beyond a reasonable doubt that he committed the charged sexual battery offenses. The allegedly improper instruction, based on Evidence Code section 1108,<sup>3</sup> was as follows:

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<sup>3</sup> Under Evidence Code section 1108, in a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Evidence Code section 1101 so long as the evidence is not inadmissible pursuant to Evidence Code section 352. (Evid. Code, § 1108, subd. (a).) Further, in authorizing the jury’s use of propensity evidence in sex offense cases, section 1108 “extends to evidence of *both* charged and uncharged sex offenses . . . .” (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1162.) Evidence Code section 352, in turn, gives the trial court discretion to exclude evidence “if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.)

“The People presented evidence that the defendant committed the crimes of kidnapping to commit rape or robbery as alleged in Count 1; sexual battery by restraint as alleged in Count 3; sexual battery by restraint as alleged in Count 10; and sexual battery by restraint as alleged in Count 11. These crimes are defined for you in instructions for these crimes.

“If you decide that the defendant committed one of these charged offenses, you may, but are not required to include [*sic*] from that from that [*sic*] evidence that the defendant was disposed or inclined to commit the other charged crimes as specified above, and based on that decision also conclude that the defendant was likely to and did commit the other charged offenses specified above. If you conclude that the defendant committed a charged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of another charged offense. The People must still prove each element of every charge beyond a reasonable doubt, and prove it beyond a reasonable doubt before you may consider one charge as proof of another charge.”

On appeal, defendant argues this instruction was erroneous because it permitted the jury to consider the propensity evidence with regard to count 1, kidnapping to commit rape or robbery, even though robbery is not a sex crime within the meaning of Evidence Code section 1108. According to defendant, by giving this instruction, the trial court “improperly diluted” the prosecution’s burden of proof because it permitted the jury to use a finding that he had committed kidnapping to commit robbery—a nonsexual offense—as evidence that he committed one of the charged sexual offenses.

We accept defendant’s point that the trial court’s modified instruction failed to distinguish the offense of kidnapping for rape from that of kidnapping for robbery, both of which were charged in count 1, when permitting the jury to use propensity evidence. However, we disagree that the instruction as drafted had the effect of lessening the prosecution’s burden to prove guilt beyond a reasonable doubt as to each of the sexual battery counts. On the contrary, the instruction confirmed this elevated standard of proof, advising jurors that a finding of guilt on one charge “is not sufficient by itself to prove

the defendant is guilty of another charged offense,” as the prosecutor was required to “prove each element of every charge beyond a reasonable doubt . . . .”

Defendant’s argument also disregards the trial court’s other instructions, including, for example, CALJIC No. 2.90, which advised the jury of defendant’s presumption of innocence; CALJIC No. 2.09, which reminded the jury that certain evidence was admitted for a limited purpose and advised that such evidence could not be considered for any purpose other than the limited purpose for which it was admitted; and CALJIC Nos. 9.54 and 10.37, which, among other things, advised the jury of the prosecution’s duty to prove every element of each charged offense beyond a reasonable doubt.

Thus, considered in the proper context of the jury charge as a whole, we conclude there is no reasonable likelihood the jury misapplied the court’s version of CALCRIM No. 1191. (*Tyler v. Cain* (2001) 533 U.S. 656, 658, fn. 1 [“the proper inquiry is not whether the instruction ‘could have’ been applied unconstitutionally, but whether there is a reasonable likelihood that the jury *did* so apply it”].) Contrary to defendant’s claim, this set of instructions collectively made clear that the jury could only find him guilty of sexual battery if, as to each of the three counts, the prosecution proved guilt beyond a reasonable doubt as to each of the four elements of this offense. We decline to presume the jury, composed of men and women of reasonable intelligence, was incapable of understanding or following this command. (*People v. Hudson* (2009) 175 Cal.App.4th 1025, 1028–1029.)

Thus, even were we to find error in the challenged instruction, we would find any such error harmless on this record. Defendant does not contend (nor could he) that the sexual abuse evidence should not have been admitted. Rather, his claim is that this evidence may have been considered for the improper purpose of finding him guilty of committing a kidnapping for robbery (as opposed to rape). In so arguing, defendant insists the evidence of kidnapping was weak as the victim (Claire) was only held against her will for a short period of time and moved a short distance. We disagree. The record reflects defendant pushed Claire inside her home from her outside entryway and, thus,

away from public view and into a more secluded location. In doing so, defendant greatly increased Claire's exposure to risk of harm. This evidence alone sufficed to meet the crime's asportation requirement. (*People v. Martinez* (1999) 20 Cal.4th 225, 232–233 [“ ‘there is no minimum number of feet a defendant must move a victim in order to satisfy the [asportation] prong’ ”; rather, the relevant inquiry is whether there was movement not merely incidental to the commission of the underlying crime that increases the risk of harm to the victim over and above that necessarily present in said crime].) Yet defendant did not stop there. After Claire was able to break free and escape from her home, defendant and his accomplice dragged her 10 to 15 feet down the street where they proceeded to rip open her shirt and grab her bare chest. Indeed, in closing argument, defense counsel did not dispute this sequence of events or label it something other than “sexual assault . . . [t]hat may even be a kidnapping”; rather, counsel insisted the perpetrator was someone other than his client. Clearly, the jury rejected this defense.

And with respect to his sexual abuse of Jane and Susan, the record reflects defendant and his associate followed the young women into the gated area surrounding Jane's townhouse complex, took out guns and demanded their belongings and, when Jane said she did not have a phone (which defendant had demanded), defendant put his hands inside her shirt and bra and directly touched both of her breasts. Defendant, still holding his gun, also reached inside Susan's shirt and “felt around,” and put his hands “around inside her butt . . . .” Defendant then used his gun to direct the young women further away from the gate and inside the private complex, insisting Jane take him into her home so he could steal more of her belongings (a demand Jane refused, telling him “[y]ou can shoot me out here”). Defendant labels this evidence of sexual battery “weak,” insisting his touching of Jane's chest was not “sexual in nature” and was only to see whether she was lying about not having a phone. Defendant's argument widely misses the mark. Sexual battery refers to touching a victim without his or her consent for the purpose of injuring, humiliating, intimidating or causing pain or discomfort—in other words, it criminalizes sexual “abuse” notwithstanding the perpetrator's alleged lack of intent to achieve sexual arousal or gratification. (*In re Shannon T.* (2006) 144 Cal.App.4th 618,

622.) There is ample evidence from which the jury could have properly concluded defendant touched these victims, per the court’s instruction, “with the specific intent to cause sexual arousal . . . *or abuse.*” (Italics added.)

Accordingly, under these circumstances, we conclude “it is not reasonably probable that a result more favorable to defendant would have been reached absent the alleged instructional error.” (*People v. San Nicolas* (2004) 34 Cal.4th 614, 669; *People v. Moore* (2011) 51 Cal.4th 1104, 1133.)

### **III. Cumulative Error.**

We likewise reject defendant’s derivative claim that reversal of the judgment is required on the basis of prejudice arising from cumulative errors at trial. Specifically, defendant contends the combined impact of the trial court’s errors rendered his trial fundamentally unfair. As discussed above, we have not identified any significant error occurring at trial, much less any error prejudicial to him. Accordingly, his combined-error argument fails. (*People v. Gamache* (2010) 48 Cal.4th 347, 408.)

### **IV. Convicting Defendant on Two Counts of Possession of a Firearm by a Felon.**

Next, defendant contends, and the People concede, that the trial court erred in convicting him on two counts of possession of a firearm by a felon instead of one count, given that the crime is a “continuing offense” and, thus, is not complete until the defendant loses dominion or control over the particular firearm. (See *Wright v. Superior Court* (1997) 15 Cal.4th 521, 525–526 & fn. 1.) We agree.

The jury found defendant guilty on two counts of being a felon in possession of a firearm—to wit, one count committed on August 31, 2013, in connection with the incident involving Susan and Jane, and another count two days later on September 2, 2013, in connection with the incident involving Alejandro. No evidence was presented that defendant used two different firearms during these two incidents occurring just days apart, much less that he lost and then regained possession of his firearm at some point between the two incidents. Rather, all the evidence demonstrated that he used and maintained possession of the same firearm for both incidents.

Accordingly, under California law, defendant correctly argues that he could only be

convicted on one count. (*People v. Mason* (2014) 232 Cal.App.4th 355, 366 [“Although the evidence showed that Mason possessed the firearm on each of the dates, there was no evidence that [his] possession of the firearm was anything but continuous over the period encompassing the four dates. . . . [His] crime was complete at the time he first possessed the gun because he violated the duty imposed by the statute not to do so. [Citation.] But the crime continued—as a single offense—for as long as the same possession continued, i.e., so long as Mason continued to violate his duty under the statute”].) We thus remand this matter to the trial court with the instruction to modify the abstract of judgment to strike the second count of possession by a felon of a firearm in violation of section 29800.

## **V. Supplemental Arguments.**

### **A. Remand for Reconsideration of Defendant’s Firearm Enhancements.**

Effective January 1, 2018, sections 12022.5, subdivision (c) and 12022.53, subdivision (h) were amended to allow the trial court to exercise its discretion under section 1385 to strike or dismiss a sentencing enhancement for firearm use at the time of a defendant’s sentencing or resentencing. In this case, as mentioned, sentencing occurred before these amendments took effect. Thus, based on the prior versions of the statutes, defendant’s sentence included multiple enhancements for firearm use under section 12022.53, subdivision (b) and section 12022.5, subdivision (a).

Both parties agree the newly amended sections 12022.5, subdivision (c) and 12022.53, subdivision (h) were intended to apply retroactively to a case, like ours, where the defendant has been convicted but the judgment is not yet final pending appeal. This is correct: “ ‘[W]hen a statute mitigating punishment becomes effective after the commission of the prohibited act but before final judgment the lesser punishment provided by the new law should be imposed in the absence of an express statement to the contrary by the Legislature.’ [Citation.] As the Supreme Court stated in [*In re*] *Estrada* [(1965) 63 Cal.2d 740], ‘When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the

prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply.’ (*In re Estrada, supra*, 63 Cal.2d at p. 745.)” (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.)

Here, “the amendment to subdivision (h) of Penal Code section 12022.53, which [took] effect before the judgment in this case [will be] final, necessarily reflects a legislative determination that the previous bar on striking firearm enhancements was too severe, and that trial courts should instead have the power to strike those enhancements in the interest of justice. Moreover, because there is nothing in the amendment to suggest any legislative intent that the amendment would apply prospectively only, we must presume that the Legislature intended the amendment to apply to every case to which it constitutionally could apply, which includes this case.” (*People v. Woods, supra*, 19 Cal.App.5th at p. 1091.)

Having considered our record in light of these principles, we agree with the parties the trial court should exercise its newly afforded discretion to decide whether to strike or dismiss the firearm enhancements imposed in this case. Accordingly, we reverse and remand this matter to the trial court for reconsideration of defendant’s sentencing enhancements in accordance with the current version of sections 12022.5, subdivision (c) and 12022.53, subdivision (h).

**B. Remand for a Hearing Related to Defendant’s Youth Offender Status.**

Lastly, we agree this case must also be remanded in light of recent changes to California law governing youth offenders, given that he was 20 years old when he committed these crimes. Specifically, the Legislature added section 3051 effective January 1, 2014, to grant youth offenders the right to a hearing to make a record of information relevant to their eventual youth offender parole hearings as contemplated by sections 3051 and 4801. As explained by the California Supreme Court in *People v. Franklin* (2016) 63 Cal.4th 261, “[s]ection 3051 . . . effectively reforms the parole eligibility date of a juvenile offender’s original sentence so that the longest possible term of incarceration before parole eligibility is 25 years.” (*Id.* at p. 281.) More specifically,

“the combined operation of section 3051, section 3046, subdivision (c), and section 4801 means that [a defendant considered a youth offender] is [deemed to be] serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration.”<sup>4</sup> (*Id.* at pp. 279–280; accord, § 4801, subd. (c) [requiring parole board to “give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law”].)

“The statutory text [also] makes clear that the Legislature intended youth offender parole hearings to apply retrospectively, that is, to all eligible youth offenders regardless of the date of conviction. . . . In addition, [former] section 3051, subdivision (i) says: ‘The board shall complete all youth offender parole hearings for individuals who became entitled to have their parole suitability considered at a youth offender parole hearing prior to the effective date of [this section] by July 1, 2015.’ This provision would be meaningless if the statute did not apply to juvenile offenders already sentenced at the time of enactment.” (*People v. Franklin, supra*, 63 Cal.4th at p. 278, first two bracketed insertions added.)

Thus, applying these principles to the facts at hand, the California Supreme Court held in *People v. Franklin* that, because it was unclear whether the defendant had sufficient opportunity to put on the record the kinds of relevant information described in sections 3051 and 4801, remand to the trial court was appropriate “for a determination of

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<sup>4</sup> When *People v. Franklin* was decided, section 3051, subdivision (b) provided that defendants under age 23 at the time of their crimes were entitled to youth offender parole hearings. (*People v. Franklin, supra*, 63 Cal.4th at p. 278.) Effective January 1, 2018, section 3051 was amended to afford the right to such hearings to defendants under age 25 when committing their crimes. (§ 3051, subd. (a)(1), as amended by Stats. 2017, ch. 684, § 1.5, No. 5B Deering’s Adv. Legis. Service, pp. 449–451.) The “core recognition” underlying these legal changes “is that children are, as a class, ‘constitutionally different from adults’ due to ‘distinctive attributes of youth’ that ‘diminish the penological justifications for imposing the harshest sentences on juvenile offenders.’ [Citation.] Among these ‘hallmark features’ of youth are ‘immaturity, impetuosity, and failure to appreciate risks and consequences,’ as well as the capacity for growth and change.” (*People v. Franklin*, at p. 283.)

whether [the defendant] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing.” (*People v. Franklin, supra*, 63 Cal.4th at p. 284.)

In our case, we agree with the parties that a record containing the kinds of relevant information described in sections 3051 and 4801 may be lacking with respect to defendant and, thus, grant his request to order a limited remand to permit him to make a record of relevant information for any future youth offender parole hearing in accordance with *People v. Franklin, supra*, 63 Cal.4th 261.

### **DISPOSITION**

Defendant’s conviction and sentence are conditionally reversed, and the matter is remanded to the trial court with instructions to:

(1) Modify the abstract of judgment to strike the second count of possession by a felon of a firearm in violation of section 29800;

(2) Exercise its discretion to decide whether to strike or dismiss the firearm enhancements in accordance with newly amended sections 12022.5, subdivision (c) and 12022.53, subdivision (h); and

(3) Hold a “youth offender” hearing so that defendant may make a record of relevant evidence in anticipation of any future youth offender parole hearing.

The judgment, in all other regards, is affirmed.

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Wiseman, J.\*

WE CONCUR:

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Siggins, P. J.

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Petrou, J.

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\* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.